No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Much of Public Citizen's research and policy work focuses on regulatory matters, and Public Citizen is often involved in litigation both challenging and defending agency action. Frequently, those cases involve application of this Court's major doctrines concerning deference to agencies: *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), which provides for deference to an agency's exercise of rulemaking authority delegated by Congress, and *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which require deference to an agency's construction of its own regulations. The government often invokes both the *Chevron* doctrine and the *Auer/Seminole Rock* doctrine in defense of agency actions challenged by Public Citizen, as well as in defense of agency actions Public Citizen supports. Public Citizen's view of the doctrines therefore does not reflect a perception that they systematically favor or disfavor outcomes it supports or positions it takes in particular matters. The role these doctrines play in cases of significance to Public Citizen's mission gives Public Citizen a strong interest in their proper application and in the more fundamental question whether the Court should continue to adhere to them.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

Both the *Chevron* doctrine and the *Auer/Seminole Rock* doctrine, at their cores, reflect application of the principle that the law commands that courts uphold reasonable exercises of authority delegated by Congress to administrative agencies. Public Citizen submits this brief in support of neither party to emphasize two points.

First, whatever the Court ultimately determines about whether to overrule *Auer* and/or *Seminole Rock*, the Court should not call into question *Chevron*'s deference to the lawful exercise of agency authority to fill gaps in regulatory schemes created by statute. Properly understood and applied, *Chevron* is fully consistent with the requirement that courts interpret statutes; *Chevron* commands deference only when a court has determined that what a statute *means* is that an agency has discretion to resolve a particular matter through regulations or other actions with the force of law. And where *Chevron* is triggered, its deferential standard implements—indeed, is commanded by—the APA's standard of review for discretionary agency action. *See* 5 U.S.C. § 706(2)(A).

Second, although the basis for *Auer* and *Seminole Rock* differs in some respects from that of *Chevron*, deference to an agency's interpretations of its own regulations likewise has a legitimate grounding in congressionally delegated authority. When an agency takes an action premised on a lawful construction of a regulation whose plain terms do not resolve the issue, the APA's deferential standard of review applies, and a court may set aside the agency's action only if it is arbitrary, capricious, or an abuse of discretion. 5

U.S.C. § 706(2)(A). The APA does not, however, command unqualified deference to an agency's regulatory construction, any more than it does to other exercises of discretion. Rather, like other actions subject to APA review, an agency's interpretation of one of its regulations must be set aside if lacks a proper, reasoned basis. Moreover, not every opinion an agency or its personnel express about a regulation, or every form in which such an opinion is expressed, reflects an agency action to which the APA standard of review applies—and thus to which *Seminole Rock* and *Auer* should apply. Nonetheless, the Court should not sweep away the deferential standard for review of an agency's construction of a regulation within the sphere properly addressed by *Auer* and *Seminole Rock*.

Public Citizen takes no position on the merits of the dispute between the parties over the proper interpretation of the regulation at issue here.

ARGUMENT

I. This Court should not call into doubt the legitimacy of *Chevron* deference.

In *City of Arlington v. FCC*, Justice Scalia explained, on behalf of a majority of this Court, that "*Chevron* is rooted in a background presumption of congressional intent." 569 U.S. 290, 296 (2013). Specifically, *Chevron* commands deference to an agency's construction of a statute if a court determines that, when Congress "'left ambiguity in a statute' administered by an agency, [it] 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Id.* (quoting *Smiley v. Citibank (S. Dak.), N.A.*, 517 U.S. 735, 740–741 (1996)).

Chief Justice Roberts's dissent, while disagreeing with the majority opinion on the resolution of the particular issue posed in that case, also accepted the proposition that "[c]ourts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretative authority over the question at issue." *Id.* at 312 (Roberts, C.J., dissenting). Despite their differences, the *Arlington* majority and dissent were united in recognizing that *Chevron* applies only when a court determines that the statute's meaning is that the agency possesses discretionary authority, and the agency acts within the scope of that discretion. *See id.* at 306–07 (majority opinion).

Two years later, however, in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), Justice Scalia's opinion concurring in the judgment, in the course of critiquing *Auer* and *Seminole Rock*, suggested that *Chevron* was "[h]eedless of the original design of the APA," *id.* at 1211, because it transferred from the courts to agencies the power to "interpret ... statutory provisions." *Id.* (citing 5 U.S.C. § 706). Although suggesting that it might be too late in the day to abandon *Chevron*, *id.* at 1212, the opinion nonetheless intimated that *Chevron* as well as *Auer/Seminole Rock* was a "judge-made doctrine[] of deference" inconsistent with "the responsibility of the court to decide whether the law means what the agency says it means." *Id.* at 1211.

Chevron is not at issue in this case. Because, however, the Court's discussion of the arguments about *Auer/Seminole Rock* may have implications for *Chevron*, the Court should be clear in avoiding characterizations of the doctrines that suggest that *Chevron* may be illegitimate. Justice Scalia (together with all the

members of the Court) was correct in *Arlington* in recognizing that where *Chevron* properly applies, it is fully consistent with congressional intent and the judicial responsibility to determine the meaning of statutes. And, as the petitioner here acknowledges, "[w]hen the APA's procedural safeguards are respected, judicial deference to agency interpretations of ambiguous statutory text is consistent with the APA's structure and purpose." Pet. Br. 46.

In a *Chevron* case, a reviewing court does not abdicate its responsibility to interpret the statute. Rather, the court defers only after it determines that the *meaning* of the statute is that Congress has delegated authority to the agency to resolve a particular issue concerning the statute's scope or application. Deference under *Chevron* is triggered when a court finds a statutory "gap" or ambiguity with respect to a matter as to which Congress has conferred rulemaking authority to an agency—a gap that ordinary principles of statutory construction, beginning with the primacy of unambiguous statutory text, cannot resolve. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 446–49 (1987). The identification of such a gap reflects a determination that the statute itself does not reflect a specific intent concerning how the agency should resolve that matter. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Rather, the terms of the statute embody an intent that the *agency* resolve the matter within the bounds set by the statute and the agency's obligation to engage in rational decisionmaking in conformity with applicable procedures. *See id.*; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Chevron is a case in point. The statute at issue there required the agency to regulate air emissions

from "stationary sources," but the statute did not express a discernible intent as to how that term should be applied to a single facility with multiple smokestacks. 467 U.S. at 845. In light of the statute's delegation of regulatory power to the agency, the Court held that what the statute meant was that the agency had discretion to determine the bounds of a stationary source, just as it had discretion with respect to other matters under the statute, such as determining the emissions limits necessary to protect public health. *See id.* at 843–45, 865–66.

Where Congress has lawfully delegated such authority, and the agency has exercised it through the procedures required by Congress—typically, through rulemaking, *see Mead Corp.*, 533 U.S. at 230—the APA provides for deferential review: The agency action is to be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Chevron*, 467 U.S. at 843. The standard is equally applicable whether the matter delegated to the agency is filling a gap in the statute by explicating ambiguous statutory terms (*Chevron*'s domain), or exercising some other form of delegated discretion, such as determining whether a motor vehicle safety standard is "reasonable, practicable, and appropriate." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 33 (1983). The "reasonableness" review a court exercises at "*Chevron* step two" is thus, properly understood, an application of APA review of the exercise of agency discretion. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (applying *State Farm* standard to an agency's construction of a statute);

Brand X, 545 U.S. at 981 (explaining that interpretations entitled to *Chevron* deference are subject to review to determine whether they are "arbitrary and capricious ... under the Administrative Procedure Act").

Accordingly, a reviewing court applying the *Chevron* framework fully complies with its obligation to "decide all relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706. It does so, first, by interpreting the statute and deferring only upon a determination that what the statute means is that Congress delegated authority to the agency on the point at issue. *Chevron* thus explicitly honors the principle that "[t]he judiciary is the final authority on issues of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Second, the court enforces the requirements of the APA, as well as the constraints that the authorizing statute places upon the agency's exercise of its discretionary authority, by considering at *Chevron* step two whether the agency's construction must be set aside as "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

In addition, even where a statute contains a gap or ambiguity providing the agency a range of discretion, it may still unambiguously rule out some purported exercises of that discretion, rendering them "not in accordance with law," in the terms of section 706(2)(A). For example, although the statute at issue in *Chevron* was ambiguous with respect to the scope of a "stationary source," and the rule at issue reflected a reasonable resolution of that ambiguity, the statute surely would have unambiguously ruled out a regulation that purported to define a facility located in New York as being within the same "stationary source" as a facility in Los Angeles. Whether such a regulation would be viewed as failing at *Chevron* step one or step two, it

would doubtless be held unlawful. As Justice Scalia put it in *Arlington*, even "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." 569 U.S. at 307. *Chevron* fully vindicates judicial authority to police the bounds of agency authority by "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *Id.*

This understanding of *Chevron*, which hews closely to the *Chevron* decision itself, avoids "an abandonment of the judicial role, while still granting due weight to agency interpretation and, within the congressionally established and judicially policed *Chevron* space, respecting agency construction." Michael Herz, Chevron *is Dead: Long Live* Chevron, 115 Colum. L. Rev. 1867, 1909 (2015).

> So understood, *Chevron* is not a revolutionary shift of authority from the judiciary to the executive. That *Chevron* is dead. Rather, *Chevron* is an appropriate allocation of decisionmaking responsibility among the three branches, relying on the judiciary to enforce congressional decisions, but protecting agency authority and discretion where Congress has left the decision to the executive. Long may it reign.

Id. This Court should suggest nothing to the contrary in this case.

II. An appropriately defined view of *Auer* and *Seminole Rock* comports with congressional intent and the judicial role.

In this case, an agency exercising congressionally delegated authority to take a specific action (namely, determine a veteran's entitlement to disability benefits) has based that action on its construction of a regulation that the court below held does not supply an unambiguous rule of decision.[2] This Court's precedents providing for deference to such decisions—the *Auer/Seminole Rock* doctrine—are consistent with congressional intent reflected in statutes that confer substantive authority on agencies and in the APA's deferential standard of review of actions reflecting congressionally delegated discretion.

Deference to an agency's reasonable construction of a regulation whose application to particular circumstances is ambiguous is grounded in the inference that, in delegating an agency authority to implement a regulatory scheme, Congress also delegated authority to construe rules reasonably in instances where their application may not be clear. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991). When an agency bases an action that Congress has authorized it to take on its construction of a regulation, its action should be entitled, under the APA, to the same degree

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[2] The government argued in its brief in opposition that the agency's construction was the best reading of the regulation without regard to deference, Opp. 10, while the petitioner's merits brief argues that the plain text of the regulations contradicts the agency's view and that the best reading supports the petitioner, Pet. Br. 55–61. The question on which this Court granted certiorari, however, assumes that, as the court of appeals concluded, the regulation is ambiguous and that the continued vitality of the *Auer/Seminole Rock* doctrine affects the outcome of the case.

of deference as other actions. That is, the action should be upheld unless it is arbitrary and capricious, an abuse of discretion, contrary to discernible dictates of statutes or regulations, or arrived at without procedures required by law. *See* 5 U.S.C. § 706(2).[3]

Such a view makes sense because a regulation, like a statute, cannot unambiguously anticipate and prescribe outcomes for every instance to which it may apply. Therefore, in instances where a rule does not provide an unambiguous answer, determining the rule's proper application—what the petitioner here calls its "best" or "fairest" interpretation, Pet. Br. 3—requires a determination that does not rest solely on the rule's language. The determination must also reflect considerations of the relevant policies animating the regulatory scheme. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297, 307–08 (2017). In cases involving regulatory authority, however, such policy determinations have been delegated to the agency, within the constraints set by the governing statute. In that circumstance, the "best" reading is one that the agency has provided and explained through lawful administrative processes. Courts cannot reasonably resolve a regulation's meaning without deferring to the agency's determination (and explanation) of the proper result, arrived at through the appropriate procedures that govern whatever agency action has supplied the agency's

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[3] As Justice Thomas has pointed out, justifying *Auer*/*Seminole Rock* simply on the basis that the agency knows what it meant when promulgating a rule would fail to account for the application of deference when the agency construing the rule is not the one that promulgated it or when the agency has changed its own construction of the rule. *See Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment).

construction. As Congress commanded in the APA, such an agency determination must be upheld if it is a reasonable exercise of the agency's authority.

That said, agencies do not have carte blanche to issue vague or ambiguous rules and then attach to the rules whatever interpretations suit their whims. *See Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). An agency's construction of a regulation, like a statutory construction, cannot disregard express terms of the governing law. And even where ambiguity exists, the agency remains constrained by the requirement of reasonableness: A court must set aside an agency action as arbitrary and capricious or an abuse of discretion if the agency has failed to "cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48. Regulatory interpretations must meet the same criteria of rationality as other agency actions:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, [a court] must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to

> make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."

Id. at 43 (citations omitted).

Thus, notwithstanding some language in *Auer* that might be read to make an agency's construction of a regulation "controlling" as long as it does not contradict unambiguous terms of the regulation, *Auer*, 519 U.S. at 461, *Auer/Seminole Rock* deference can be no more absolute than *Chevron* deference. Although some decisions of this Court appear to give short shrift to review of the reasonableness of an agency's construction, *Seminole Rock* itself and many of the cases following it in fact have considered whether the agency's construction is reasonable, as opposed to merely possible linguistically, and have sustained it only after finding it reasonable. *See, e.g., Ehlert v. United States*, 402 U.S. 99 (1971) (stating that the Court was "obligated to regard as controlling a *reasonable*" interpretation (emphasis added)); *see also* Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 Conn. L. Rev. 226, 246–47, 251–54, 256 (2013) (describing examples of the Court's assessment of the reasonableness of an agency's interpretation in *Seminole Rock* and later cases following it).

As under *Chevron*, the requirement of reasonableness is equivalent to and follows from the APA's requirement that courts set aside arbitrary and capricious action. The requirement therefore imposes significant constraints on an agency's ability to take action premised on a new construction of a rule. As this Court has held, the requirement of rational explana-

tion that flows from the APA's arbitrary-and-capricious standard of review demands that agencies acknowledge and give reasons for changes in position. *See Encino Motorcars*, 136 S. Ct. at 2125–26; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The requirement that agencies consider all factors relevant to their actions, *see State Farm*, 463 U.S. at 43, also carries with it the obligation to take into account possible reliance interests when an agency changes its construction of a regulation, *see Encino Motorcars*, 136 S. Ct. at 2126. Conversely, consistent agency constructions or ones contemporaneous with a rule's promulgation, as the Court has long recognized, are more easily sustained as reasonable. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). These principles give ample scope to an agency's authority to change policies within the constraints imposed by the express requirements of statutes and rules, *Brand X*, 545 U.S. at 981, while at the same time balancing that deference with meaningful review of the reasonableness of such change.

Procedural constraints on agency action are also relevant to whether an agency's construction of a regulation is sustainable under the APA's deferential standards. Agency actions may be sustained under the deferential arbitrary-and-capricious standard only if they comply with applicable procedural requirements. *See* 5 U.S.C. § 706(2)(D). Moreover, the inference that Congress intends an agency's resolution of an issue to be authoritative is available only where the agency acts on the basis of "congressional authorizations to engage in the process ... that produces [actions] for which deference is claimed." *Mead Corp.*, 533 U.S. at 229. "It is fair to assume generally that Congress contemplates administrative action with the effect of law

when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230.

These principles are as applicable to agency regulatory interpretations as to other agency pronouncements. A regulatory interpretation that is not the result of a lawful exercise of authority delegated by Congress to resolve issues through a particular type of agency action should not qualify for review under the deferential standard of the APA. This court thus has likely extended *Seminole Rock/Auer* deference too far in applying it to statements of an agency's position by staff or lawyers, including statements in legal briefs. *See Auer*, 519 U.S. at 462. Such interpretations, which are not the result of exercises of deliberative authority delegated by Congress, are entitled to the weight that respectful consideration of their "power to persuade" may give them, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but not to the added weight of an action that may be set aside only if arbitrary and capricious.

If *Auer* has gone too far in extending deference to some interpretations not entitled to it, however. this case is not the proper vehicle in which to correct that defect. The interpretation here was issued by the agency in a formal adjudication that Congress expressly empowered it to conduct. Such a proceeding falls within the heartland of the kinds of agency actions for which Congress typically prescribes deferential standards of review.[4] A recent study, moreover,

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[4] The statute providing for review in this case, 38 U.S.C. § 7292(d)(1), mirrors the standards of review set forth in 5 U.S.C. § 706(2).

demonstrates that *Seminole Rock/Auer* deference is more often extended to adjudications, other relatively formal actions, and regulatory preambles than to briefs and other pronouncements that lack the force of law. *See* William Yeatman, *Note: An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515, 520 & nn.23 & 24 (2018). A doctrine most commonly applied within its proper sphere should not be discarded wholesale because of concerns about its application at the margins.

Deference to agency regulatory constructions is not the equivalent of lawlessness or judicial self-abnegation. Rather, *Seminole Rock/Auer* deference, properly applied, reflects that the proper construction of an ambiguous regulation cannot be determined without reference to the agency actions construing it, and that basic principles of administrative law embodied in the APA require that actions reflecting reasonable constructions of regulations be upheld by the courts.

CONCLUSION

For the foregoing reasons, this Court should, regardless of its disposition of the case, do nothing to call into question the legitimacy and continued vitality of the *Chevron* doctrine, and the Court should decline to hold categorically that an agency's construction of an ambiguous regulation is not entitled to the deference this Court has long afforded under such decisions as *Auer* and *Seminole Rock* and that the APA commands.

Respectfully submitted,

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